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On Behalf of the Stop Patent Abuse Now (SPAN) Coalition

House Energy & Commerce
Subcommittee on Commerce, Manufacturing, and Trade

Hearing on "H.R. ____, a bill to enhance federal and state enforcement of fraudulent patent demand letters."

May 22, 2014

Chairman Terry, Ranking Member Schakowsky, and members of the Subcommittee:

On behalf of the SPAN Coalition, I thank you for your leadership in addressing patent troll demand letters. SPAN's members include the American Association of Advertising Agencies ("4A's"), the Direct Marketing Association, the Association of National Advertisers, the National Retail Federation, and the Mobile Marketing Association. But whether you're a coffee shop, a restaurant, a retailer, a marketer, a hotel, an ad agency, or any other business or non-profit, the "smash and grab" tactics embodied in deceptive patent troll demand letters are a scourge affecting main streets across the country. This sad, but incontrovertible, fact clearly was established in the Committee's earlier hearings, both in this Subcommittee and the Oversight & Investigations Subcommittee.

To be clear, we strongly believe innovation is the cornerstone of our nation's economy, but these patent troll practices are not the practices of patent holders legitimately seeking to engage with alleged infringers. As you have heard in previous hearings, for many main street businesses, the receipt of a deliberately vague, unfair or deceptive patent troll demand letter imposes a series of very bad choices for the recipient. Either you hire a patent lawyer to investigate the vague claims in the letter; stop using the technology; ignore the letter at the risk of further harassment and jeopardy; or grudgingly pay the ransom to make the problem go away, which is what the troll is banking on. That's the troll's business model. This all costs main street businesses money they don't have or can ill-afford, especially in this economy, coming at the expense of business expansion and jobs. All the troll needs is a stack of simple form letters, envelopes, and postage stamps.

Congress can help, and we are extremely pleased that the Subcommittee has circulated the Discussion Draft upon which this hearing is focused. I want to commend you and your staff for your excellent work. I was asked to provide SPAN's comments on the Discussion Draft.

While I will discuss this later in my testimony, at the outset I want to flag the definitions of "systems integrator" and "end user," which we believe exclude from the bill's protections certain main street victims of patent troll demand letters. Therefore, this is a threshold issue for SPAN, and we look forward to working with you to resolve it. That said, the following are SPAN's further comments:

First, SPAN strongly supports the Discussion Draft's primary objective, which is to clarify the Federal Trade Commission's (FTC) existing Section 5 authority to bring enforcement actions against those who send unfair or deceptive patent settlement demand letters. And while the FTC generally has authority to act in this area, we believe it is critically important for Congress to clarify this authority to better protect main street businesses from such unfair or deceptive practices, much like when Congress enacted the Fair Debt Collection Practices Act or CAN-SPAM Act. The Discussion Draft targets unfair or deceptive practices masquerading as legitimate patent demand letters. As such, addressing this problem is not about patent policy, but instead about unfair or deceptive practices. Moreover, we believe this legislation would withstand First Amendment scrutiny.

Second, we believe the Discussion Draft fairly well captures (in section 2(a)) the universe of unfair or deceptive practices embodied in many of the patent troll demand letters that we have seen to date. However, given how these patent trolls are adept in scam artistry, SPAN is concerned about other unfair or deceptive practices that patent trolls may develop in the future, not explicitly included in the Discussion Draft. Therefore, we strongly recommend inclusion of language to clarify that the legislation is not intended to foreclose the FTC's Section 5 enforcement authority to pursue any unfair or deceptive acts or practices with respect to patent demand letters not otherwise expressly listed in the legislation. SPAN would have grave concerns about legislation that either did not expressly enable such future enforcement by the FTC or would have the effect of foreclosing such future enforcement by the FTC.

Third, we believe the Discussion Draft fairly well captures (in section 2(a)(4)) the basic elements of transparency that should be included in a demand letter. However, we recommend the inclusion of additional elements addressing the settlement demand amount and the basis for it, as well as further information about the real party in interest, all of which we believe would further improve transparency beyond the elements in the draft. In addition, we strongly support (in section 2(a)(4)(C) and (D)) requiring an "identification . . . of at least one product, service, or other activity . . . alleged to be infringed " and a "description. . . of how the product service or activity . . . infringes." However, we are concerned that such identification or description is required only "to the extent reasonable under the circumstances." We believe such language could become a loophole that trolls will exploit. We believe that if a patent holder is incapable of such identification and description in a demand letter, then it raises serious questions as to the claims being made in the letter. This is especially so considering that the letters within the scope of this provision would have to be sent within the context of "a pattern or practice" to "end-users" and "systems integrators," and there is a rebuttable presumption that failure to include such information is not an unfair or deceptive practice if a good faith effort is made to include it (and there are otherwise no violations of paragraphs (1) through (3) of subsection (a)).

Fourth, we appreciate the Discussion Draft's focus on fulfilling its primary objective without unreasonably burdening the legitimate correspondence necessary to resolve good faith patent disputes, typically between sophisticated parties, as distinct from the patent troll demand letters besieging main street businesses. SPAN's understanding is that the Discussion Draft seeks to address the concerns of patent holders who send legitimate correspondence by limiting the scope of the bill to those who engage in a "pattern or practice" of sending of patent demand letters. SPAN does not oppose such a limitation in concept, provided that it does not get defined in a way that becomes a loophole easily evaded by patent trolls. Similarly, we understand the

Committee's intent behind including "bad faith" as an additional condition for certain of the unfair or deceptive practices expressly listed in the Discussion Draft. SPAN does not necessarily oppose the concept, provided that the definition of "bad faith" is not inconsistent with the FTC's existing standards for unfairness and deception under Section 5 or does not render the law unlikely to be enforced. We look forward to working with the Committee on this.

Fifth, as previously discussed, the scope of the Discussion Draft to patent demand letters sent to "end users" and "systems integrators." Given the Discussion Draft's limitation to only those who engage in the "pattern or practice" of sending letters, SPAN is concerned that further limiting the scope of the bill to letters sent to "end users" and "systems integrators" is not only unnecessary, but also may exclude from the bill's protections certain main street victims of patent troll demand letters. We appreciate the effort of staff to get this right, and look forward to continuing our work with the Committee in this regard.

Sixth, we are concerned that the Discussion Draft's inclusion of a rebuttable presumption (section 2(b)) may render the law less likely to be enforced. Therefore, rather than a rebuttable presumption, we recommend that the provision be converted to an affirmative defense.

Seventh, consistent with the Discussion Draft, we believe that State Attorneys General ought to be authorized to enforce the federal law, along with the FTC. However, we believe State Attorneys General ought to be able to seek civil penalties, which the Discussion Draft does not permit. We need rigorous State AG enforcement, and the threat of civil penalties are an important deterrent.

At the end of the day, nothing in the Discussion Draft limits anyone's right to enforce a patent, nor does it limit anyone's right to send a patent demand letter, provided - if one is engaged in a "pattern or practice" of sending letters -- the letters contain certain basic information, which legitimate patent holders likely would include anyway, and the letters are not otherwise unfair or deceptive.

On behalf of SPAN, thank you again for your leadership in addressing this important issue affecting main street businesses across the country. Let there be no confusion, we fully support your effort, and we look forward to working with the Committee as it moves this legislation forward.